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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Clifford B. Evelyn, Jr.,
Plaintiff,

v.

Unknown Hart, et al.,
Defendants.

No. CV-22-08172-PHX-JAT (JFM)

ORDER

Pending before the Court is Plaintiff's Second Amended Complaint (Doc. 13). The Court will order Defendants Robinson and Hart to answer a portion of Count One of the Second Amended Complaint and will dismiss the remaining claims and Defendants without prejudice.

I. Background

On September 23, 2022, pro se Plaintiff Clifford B. Evelyn, Jr., who is confined in the Arizona State Prison-Kingman and proceeding in forma pauperis, filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. In a December 19, 2022 Order, the Court dismissed the Complaint with leave to amend. On January 31, 2023, Plaintiff filed a First Amended Complaint, which the Court dismiss with leave to amend in a March 31, 2023 Order. Plaintiff filed the Second Amended Complaint on April 21, 2023.

II. Statutory Screening of Prisoner Complaints

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or an employee of a governmental entity. 28

1 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff
 2 has raised claims that are legally frivolous or malicious, that fail to state a claim upon which
 3 relief may be granted, or that seek monetary relief from a defendant who is immune from
 4 such relief. 28 U.S.C. § 1915A(b)(1)–(2).

5 A pleading must contain a “short and plain statement of the claim *showing* that the
 6 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does
 7 not demand detailed factual allegations, “it demands more than an unadorned, the-
 8 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 9 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
 10 conclusory statements, do not suffice.” *Id.*

11 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
 12 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
 13 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
 14 that allows the court to draw the reasonable inference that the defendant is liable for the
 15 misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for
 16 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
 17 experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s specific factual
 18 allegations may be consistent with a constitutional claim, a court must assess whether there
 19 are other “more likely explanations” for a defendant’s conduct. *Id.* at 681.

20 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
 21 must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338, 342
 22 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent
 23 standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v. Pardus*, 551
 24 U.S. 89, 94 (2007) (per curiam)).

25 **III. Second Amended Complaint**

26 Plaintiff names the following Defendants in his three-count Second Amended
 27 Complaint: GEO Deputy Warden Hart, Mailroom Sergeant Marschke, Correctional
 28 Officer IV Martin, Appeals Administrator D. Miller, GEO Mail Room Sergeant Phillips,

1 Senior Chaplain Robinson, Central Office Chaplain Dr. Kenneth Herman, GEO Deputy
2 Warden Rydgren, Disciplinary Hearing Officer McCain, and Central Office Appeals
3 employee Julie Bowers. Plaintiff seeks money damages.

4 In Count One, Plaintiff alleges violations of his First Amendment right to the free
5 exercise of religion. Plaintiff claims that in January 2022, Defendants Marschke,
6 Robinson, Hart, and Miller prohibited him from receiving his approved subscription of the
7 Nation of Islam News. Plaintiff claims this is a violation of the Religious Land Use and
8 Institutionalized Persons Act (RLUIPA) because it is a “substantial burden, compelling
9 interest.” On May 3, 2022, Defendants Robinson and Hart denied Plaintiff and other
10 Muslim inmates’ request “to come together and celebrate Eid al-Fitr, one of Islam’s major
11 religious observations at the closing of Ramadan.” Plaintiff claims this violated his free
12 exercise rights and substantially burdened his religious practice, without a rational
13 penological justification. Plaintiff contends Defendant Herman “condoned the actions of
14 GEO Chaplain Robinson’s denial of the celebration of the Muslim major holy day Eid al-
15 Fitr.”

16 In Count Two, Plaintiff alleges violations of his First Amendment rights with regard
17 to mail. Plaintiff asserts that on February 9, 2022, Defendant Phillips withheld Internal
18 Revenue Service (IRS) tax forms. On September 19, 2022, a certified mail receipt was
19 “given to a random inmate.” Plaintiff further claims religious books were returned to the
20 sender and the mailroom “never informed [him] they arrived and were sent back to
21 publishing/sender.” On March 6, 2023, a certified mail receipt belonging to Plaintiff was
22 found in the garbage. Plaintiff contends that on January 18, and February 3, 10, and 27,
23 2023, Defendant Bowers interfered with notices. On February 3, 2023, Defendant Phillips
24 discarded Plaintiff’s mail to the Social Security Administration, discarded his certified mail
25 receipt, and charged Plaintiff for the outgoing discarded mail. Plaintiff contends Defendant
26 Phillips has tampered with multiple items of outgoing certified mail. On January 25, 2023,
27 mailroom staff opened and tampered with Plaintiff’s “last amended civil paperwork [that
28 Plaintiff] sent to the court, switching mail sent to risk management or the attorney general

1 with paperwork sent to the Clerk of the Court of amended above case [number], preventing
2 the court from receiving correct documents.”

3 In Count Three, Plaintiff claims Defendant Martin retaliated against him, in
4 violation of the First Amendment. Plaintiff claims that on July 8, 2022, Defendant Martin
5 issued a disciplinary violation against Plaintiff for “utilizing the informal grievance
6 process, citing ‘obstruction of staff.’” On November 1, 2022, Defendant Martin issued a
7 disciplinary report against Plaintiff for “utilizing the informal grievance process citing
8 [Plaintiff] was ‘abusing the grievance system,’ for using the process to hold her colleagues
9 accountable.” Plaintiff sent a notice to Defendant McCain on December 22, 2022, and on
10 January 10, 2023, Defendant McCain retaliated against Plaintiff “by having [Assistant]
11 GEO DW Rydgren send [Plaintiff] to the hole without a disciplinary report citing ‘staff
12 conflict’ without justification of any conflict.” Plaintiff claims he was in the “hole” for
13 eight days without a disciplinary write-up.

14 **IV. Claim for Which an Answer Will be Required**

15 Liberally construed, Plaintiff has adequately stated a First Amendment and RLUIPA
16 claim in Count One regarding the denial of an Eid al-Fitr celebration. The Court will
17 require Defendants Robinson and Hart to answer this claim.

18 **V. Failure to State a Claim**

19 **A. Count One - Religion**

20 To state a First Amendment, free-exercise-of-religion claim, a plaintiff must allege
21 that a defendant burdened the practice of plaintiff=s religion by preventing him from
22 engaging in a sincerely held religious belief and that the defendant did so without any
23 justification reasonably related to legitimate penological interests. *Shakur v. Schriro*, 514
24 F.3d 878 (9th Cir. 2008). Under RLUIPA, a government may not impose a substantial
25 burden on the religious exercise of a confined person unless the government establishes
26 that the burden furthers a “compelling governmental interest” and does so by “the least
27 restrictive means.” 42 U.S.C. § 2000cc-1(a)(1)-(2).

28

1 Plaintiff asserts he was denied issues of his religious newspaper, “Nation of Islam
2 News.” Although Plaintiff makes the conclusory allegation that this is a “substantial
3 burden, compelling interest,” Plaintiff does not allege facts showing that reading a religious
4 newspaper is part of his religious practice or necessary to his sincerely held religious
5 beliefs. Accordingly, these allegations fail to state a claim, and the Court will dismiss this
6 portion of Count One.

7 The Court will also dismiss the claim in Count One against Defendant Herman.
8 Plaintiff alleges Herman “condoned” Defendants Robinson and Hart’s denial of an Eid al-
9 Fitr celebration, but does not allege exactly what Herman did or failed to do that violated
10 Plaintiff’s constitutional rights, or how or when Herman was made aware of the celebration
11 denial. Plaintiff has therefore failed to state a claim against Defendant Herman in Count
12 One.

13 **B. Count Two - Mail**

14 Prisoners have “a First Amendment right to send and receive mail.” *Witherow v.*
15 *Paff*, 52 F.3d 264, 265 (9th Cir. 1995) (per curiam) (citing *Thornburgh v. Abbott*, 490 U.S.
16 401, 407 (1989)). However, a prison may adopt regulations which impinge on an inmate’s
17 constitutional rights if those regulations are “reasonably related to legitimate penological
18 interests.” *Turner v. Safley*, 482 U.S. 78, 89 (1987). “Prevention of criminal activity and
19 the maintenance of prison security are legitimate penological interests which justify the
20 regulation of both incoming and outgoing prisoner mail.” *O’Keefe v. Van Boening*, 82 F.3d
21 322, 326 (9th Cir.1996); *see, e.g., Witherow*, 52 F.3d at 265 (noting that security, order,
22 and rehabilitation are legitimate penological interests which justify the inspection of
23 outgoing prisoner mail).

24 Further, although pro se pleadings are liberally construed, *Haines v. Kerner*, 404
25 U.S. 519, 520-21 (1972), conclusory and vague allegations will not support a cause of
26 action. *Ivey v. Bd. of Regents*, 673 F.2d 266, 268 (9th Cir. 1982). A liberal interpretation
27 of a civil rights complaint may not supply essential elements of the claim that were not
28 initially pled. *Id.*

1 In Count Two, Plaintiff alleges Defendant Phillips withheld tax forms, gave
 2 Plaintiff's certified mail receipt to another inmate, discarded mail sent to the Social
 3 Security Administration, discarded a certified mail receipt, charged Plaintiff for outgoing
 4 discarded mail, and "tampered with multiple outgoing certified mail."

5 To the extent Plaintiff claims Defendant Phillips tampered with outgoing mail, his
 6 allegations are too vague to state a claim. Plaintiff does not allege when Defendant Phillips
 7 tampered with mail, how the mail was tampered with, or that the interference with
 8 Plaintiff's mail was unrelated to a legitimate penological interest. Plaintiff's allegations
 9 regarding tax forms are similarly too vague to state claim. Plaintiff does not describe what
 10 reason Defendant Phillips gave for withholding the tax forms or allege there was no
 11 legitimate purpose for withholding the forms.

12 The remaining allegations against Defendant Phillips would show, at best, that
 13 Defendant Phillips was negligent in handling mail or certified mail receipts. Negligence,
 14 however, is insufficient to state a constitutional violation. *See Cnty. of Sacramento v.*
 15 *Lewis*, 523 U.S. 833, 848-49 (1998) ("[T]he Constitution does not guarantee due care on
 16 the part of state officials; liability for negligently inflicted harm is categorically beneath
 17 the threshold of constitutional due process.").

18 Plaintiff further claims that Defendant Bowers "impeded" the filing of notices with
 19 officials at ADC's Central Office. This allegation is too vague to state a claim. Plaintiff
 20 does not describe the nature of the notices and does not describe how Defendant Bowers
 21 "impeded" the notices or how that violated Plaintiff's constitutional rights.

22 Plaintiff's remaining allegations regarding mail are not linked to specific, named
 23 Defendants. Accordingly, the Court will dismiss Count Two for failure to state a claim.

24 **C. Count Three – Retaliation**

25 A viable claim of First Amendment retaliation contains five basic elements: (1) an
 26 assertion that a state actor took some adverse action against an inmate (2) because of
 27 (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise
 28 of his First Amendment rights (or that the inmate suffered more than minimal harm) and

(5) did not reasonably advance a legitimate correctional goal. *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005); *see also Hines v. Gomez*, 108 F.3d 265, 267 (9th Cir. 1997) (retaliation claim requires an inmate to show (1) that the prison official acted in retaliation for the exercise of a constitutionally protected right, and (2) that the action “advanced no legitimate penological interest”). The plaintiff has the burden of demonstrating that his exercise of his First Amendment rights was a substantial or motivating factor behind the defendants’ conduct. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Soranno’s Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989).

Plaintiff’s retaliation allegations are too vague to state a claim. Plaintiff alleges Defendant Martin issued disciplinary reports against him for “obstruction of staff” and “abusing the grievance system,” in retaliation for Plaintiff filing grievances, but Plaintiff does not allege Martin acted without a legitimate penological interest or that Plaintiff suffered more than minimal harm, or any harm, as a result of the disciplinary tickets. Plaintiff fails to state a retaliation claim against Defendant Martin.

Plaintiff also claims he sent a “notice” to Defendant McCain, after which McCain retaliated against him by having Defendant Rydgren issue a disciplinary report charging Plaintiff with “staff conflict without justification of any conflict.” Plaintiff does not describe the “notice” or its contents and it is therefore unclear that the “notice” was protected conduct. Accordingly, Plaintiff has failed to state a retaliation claim, and the Court will dismiss Count Three.

VI. Warnings

A. Release

If Plaintiff is released while this case remains pending, and the filing fee has not been paid in full, Plaintiff must, within 30 days of his release, either (1) notify the Court that he intends to pay the unpaid balance of his filing fee within 120 days of his release or (2) file a *non-prisoner* application to proceed in forma pauperis. Failure to comply may result in dismissal of this action.

1 **B. Address Changes**

2 Plaintiff must file and serve a notice of a change of address in accordance with Rule
3 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
4 relief with a notice of change of address. Failure to comply may result in dismissal of this
5 action.

6 **C. Copies**

7 Plaintiff must serve Defendants, or counsel if an appearance has been entered, a
8 copy of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a
9 certificate stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also, Plaintiff
10 must submit an additional copy of every filing for use by the Court. *See* LRCiv 5.4. Failure
11 to comply may result in the filing being stricken without further notice to Plaintiff.

12 **D. Possible Dismissal**

13 If Plaintiff fails to timely comply with every provision of this Order, including these
14 warnings, the Court may dismiss this action without further notice. *See Ferdik v. Bonzelet*,
15 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure
16 to comply with any order of the Court).

17 **IT IS ORDERED:**

18 (1) Counts Two and Three, and the portions of Count One discussed above, are
19 **dismissed** without prejudice.

20 (2) Defendants Marschke, Martin, Miller, Phillips, Herman, Rydgren, McCain,
21 and Bowers are **dismissed** without prejudice.

22 (3) If Plaintiff attempts to amend to address the shortcomings identified in this
23 Order, the amended complaint must be retyped or rewritten in its entirety (including those
24 claims and Defendants that were not dismissed), and Plaintiff must comply with Rule 15
25 of the Federal Rules of Civil Procedure and Rule 15.1 of the Local Rules of Civil
26 Procedure.

27 (4) Defendants Robinson and Hart must answer the portion of Count One
28 relating to the Eid al-Fitr celebration.

(5) The Clerk of Court must send Plaintiff a service packet including the Second Amended Complaint (Doc. 13), this Order, and both summons and request for waiver forms for Defendants Robinson and Hart.

(6) Plaintiff must complete¹ and return the service packet to the Clerk of Court within 21 days of the date of filing of this Order. The United States Marshal will not provide service of process if Plaintiff fails to comply with this Order.

(7) If Plaintiff does not either obtain a waiver of service of the summons or complete service of the Summons and Second Amended Complaint on a Defendant within 90 days of the filing of the Complaint or within 60 days of the filing of this Order, whichever is later, the action may be dismissed as to each Defendant not served. Fed. R. Civ. P. 4(m); LRCiv 16.2(b)(2)(B)(ii).

(8) The United States Marshal must retain the Summons, a copy of the Second Amended Complaint, and a copy of this Order for future use.

(9) The United States Marshal must notify Defendants of the commencement of this action and request waiver of service of the summons pursuant to Rule 4(d) of the Federal Rules of Civil Procedure. The notice to Defendants must include a copy of this Order.

(10) A Defendant who agrees to waive service of the Summons and Second Amended Complaint must return the signed waiver forms to the United States Marshal, not the Plaintiff, **within 30 days of the date of the notice and request for waiver of service** pursuant to Federal Rule of Civil Procedure 4(d)(1)(F) to avoid being charged the cost of personal service.

(11) The Marshal must immediately file signed waivers of service of the summons. If a waiver of service of summons is returned as undeliverable or is not returned

¹ If a Defendant is an officer or employee of the Arizona Department of Corrections, Rehabilitation & Reentry, Plaintiff must list the address of the specific institution where the officer or employee works. Service cannot be effected on an officer or employee at the Central Office of the Arizona Department of Corrections, Rehabilitation & Reentry unless the officer or employee works there.

1 by a Defendant within 30 days from the date the request for waiver was sent by the Marshal,
2 the Marshal must:

3 (a) personally serve copies of the Summons, Second Amended
4 Complaint, and this Order upon Defendant pursuant to Rule 4(e)(2) of the Federal
5 Rules of Civil Procedure; and

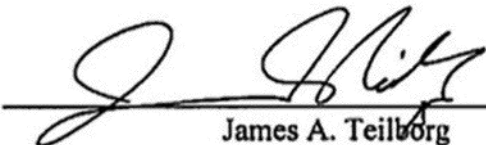
6 (b) within 10 days after personal service is effected, file the return of
7 service for Defendant, along with evidence of the attempt to secure a waiver of
8 service of the summons and of the costs subsequently incurred in effecting service
9 upon Defendant. The costs of service must be enumerated on the return of service
10 form (USM-285) and must include the costs incurred by the Marshal for
11 photocopying additional copies of the Summons, Second Amended Complaint, or
12 this Order and for preparing new process receipt and return forms (USM-285), if
13 required. Costs of service will be taxed against the personally served Defendant
14 pursuant to Rule 4(d)(2) of the Federal Rules of Civil Procedure, unless otherwise
15 ordered by the Court.

16 (12) Any answer or response must state the specific Defendant by name on whose
17 behalf it is filed. The Court may strike any answer, response, or other motion or paper that
18 does not identify the specific Defendant by name on whose behalf it is filed.

19 (13) This matter is referred to Magistrate Judge James F. Metcalf pursuant to
20 Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as
21 authorized under 28 U.S.C. § 636(b)(1).

22 Dated this 25th day of May, 2023.

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James A. Teilborg
Senior United States District Judge